IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-503

No. .....

DALLAS KENT FRISBY,

Petitioner

v.

STATE OF WEST VIRGINIA,

Respondent

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Appeals of West Virginia

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MISCELLANEOUS:

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STATE OF WEST VIRGINIA,

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To The Supreme Court of Appeals of West Virginia

Petitioner, Dallas Kent Frisby, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this case on June 27, 1978.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia is unofficially reported in 245 S.E. 2d 543. The opinion is set forth in full herein in Appendix A, pp. A-____ to A-____, *infra*.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on June 27, 1978, and this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether Police Officers may use their powers of inspection as a pretext to stop a Motorist who is not in Violation of any Traffic Law and use the "Stop" as the Basis of a Search and Seizure.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fourth Amendment to the United States Constitution; Article 3, § 6 of the West Virginia Constitution; West Virginia Code, Ch. 17A, Art. 3, sec. 13, Ch. 17A, Art. 9, sec. 2, and Ch. 17B, Art. 2, secs. 1 and 9. All are appended at App. B, *infra.*

STATEMENT OF THE CASE

On September 7, 1975, at approximately 2:30 a.m., the petitioner and a companion were operating a van type truck in the city of Weirton, West Virginia, and came to a stop for a red light at an intersection (R. 198-200).[1] Officer Gordon, a city policeman, followed the van approximately four blocks and decided to stop it for a "routine" check. (R. 196, 200). Actually, the officer stopped the van on the basis of his unfamiliarity with the license plate, (R. 196), and the following testimony is pertinent:

* * *

[1]Page references are to the record as prepared and indexed by the Clerk of the Supreme Court of Appeals of West Virginia.

"Q Was there anything unusual about that van? Did it seem . . .

A The license plate brought my attention to it. And one of the rear windows was missing.

Q Well, when you first saw it, there was nothing unusual about that van itself? Correct?

A No. The license plates was what was unusual about the van.

Q Well, let's talk about the license plates.

A Okay.

Q What was it about the plate that called your attention to the license plate?

A The unfamiliarity of myself with the plate, my unfamiliarity with it. The . . . no actual state name on the plate. There was a . . .

Q Were there numbers?

A Yes. It was . . . as I recall, it was small letters. MOBL, I believe.

Q Above the numbers on this plate, is it not true that the letters were, BLMO?

A I would say so, yes.

Q And you were unfamiliar with what these letters stood for, is that right?

A No. Well, I didn't know what state the plate was from. I didn't know . . .

Q And you didn't know what BLMO meant, did you?

A No. I didn't know what that meant either."

(R. 199-200)

Officer Gordon further testified that:

"Q All right. During that four block stretch, did you

observe any improper driving by the defendant in that van?

A No. Not then.

Q Any traffic violation that you observed?

A The only traffic violation I observed while Mr. Frisby was operating the motor vehicle was the failure to give a turn signal as he came out of Hazlett onto Main. And I mentioned that earlier to you.

Q Did he have a green light when he left the Dinor and made the right turn?

A Yes. Yes, he did.

Q You didn't intend to arrest him for not having his turn signal on, did you?

A No. That wasn't why he was stopped.

Q And you did not in fact arrest him for not having his turn signal on, is that not correct?

A That is correct.

Q Is it a fair statement, Mr. Gordon, that the reason you stopped the van was because you were unfamiliar with the license plate?

A Well, as I understand it, yes. That's the reason why I stopped the van. Mostly because I wanted to determine whether or not the van was stolen.

Q Well, you had no previous information or notion that it was stolen. The only thing that aroused your curiosity was your unfamiliarity with a license plate on the van? Is that not the fact, sir? Is that not a fair statement?

A Okay. It's correct.

Q And did you subsequently not learn what BLMO meant?

A Yes.

Q What does it mean?

A It means Missour(sic) license beyond limits. I guess there is a restriction upon certain license plates . . . about how far you can drive it.

Q Is it not a fact, sir, that one pays a larger registration fee if he intends to take his truck beyond the territorial limits of Missouri?

A That is a fact.

Q And was this van not in fact properly registered?

A Yes, it was.

Q And a valid plate was on that van, is that not correct?

A That is correct."

(R. 200, 201, 202)

The petitioner got out of the van after being signaled to stop by Officer Gordon and while petitioner was talking with Officer Gordon another officer looked through the rear window of the van with a flashlight and observed what he thought to be part of a rifle. (R. 91, 95, 202).

Petitioner and his companion were then placed under arrest and taken to police headquarters where a search warrant was issued. (R. 102).[2] The "probable cause"

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[2]Officer Gordon opened the door of the van and stuck his head inside, looked under the seat and found a gun, which he seized and while partially inside the van he smelled a strong odor of what he ". . . suspected to be marihuana" (R. 99). The rifle was also seized and because the van ". . . was extremely cluttered . . . it became necessary to remove items from the van . . ." (R. 100) Over objection the weapons were introduced at the trial. (R. 101).

for the search warrant was that while Officer Gordon was retrieving the rifle from the van, he allegedly detected the odor of marijuana in the van. (R. 101, 102).

Petitioner was indicted at the September, 1975, term of the Circuit Court of Hancock County, West Virginia, for possession with the intent to deliver one hundred seventy-nine pounds and three-fourths ounces of marijuana. Petitioner filed several pre-trial motions among which was a motion to suppress the evidence seized from the van, which, after a hearing was denied by the trial court. (R. 24, 25, 193-204).

A trial by jury was held on February 9, 1976, and the petitioner was found guilty and sentenced to an indefinite term of not less than one (1) year nor more than five (5) years in the penitentiary.

On July 8, 1976, a petition for writ of error and supersedeas was filed in the Supreme Court of Appeals of West Virginia and the writ was allowed on January 31, 1977.

On June 27, 1978, the Supreme Court of Appeals handed down a decision affirming the judgment of the circuit court of Hancock County, West Virginia. The Court, in its opinion, acknowledged that the Fourth Amendment question was the most "troublesome" of the issues[3] but ostensibly upheld the conviction on the basis of *Terry* v. *Ohio*, 392 U.S. 1 (1968) and certain provisions of the West Virginia motor vehicles.

REASON FOR GRANTING THE WRIT

Police officers may not use their powers of inspection as a pretext to stop a motorist who is not in violation

[3]The Court characterized it as being ". . . the tenuous legality of the police's initial detention of the appellant . . ." 245 S.E. 2d at 625.

of any traffic law and use the "stop" as the basis of a search and seizure.

The Fourth Amendment to the Constitution of the United States guarantees the right ". . . to be secure . . . against unreasonable searches and seizures . . ." and although the West Virginia Court has traditionally construed our virtually identical provision[4] in harmony with the Fourth Amendment, *State* v. *Duvernoy*, 156 W. Va. 578, 195 S.E. 2d 631 (1973), a deviation occurred in the instant case.[5]

It is a basic principle that the Fourth Amendment proscribes all unreasonable searches and seizures and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions" *Mincey* v. *Arizona*, ... U.S. ....., 98 S.Ct. ....., 57 L.Ed.2d 290, 298 (1978).

The West Virginia Supreme Court acknowledged that the "routine" check could not be used to make legitimate otherwise unwarranted police intrusion but concluded that the initial search was justified under *Terry* v. *Ohio*, 392 U.S. 1 (1968) and, at page 626 (245 S.E.2d) stated:

> "While a police officer's casual observation of an out-of-state license plate would not by itself warrant further investigation, the observation of a plate which does not appear to have come from any other state does. *Under these circumstances further investigation is not an onerous burden on*

[4]Article 3, section 6 of the Constitution of West Virginia is appended hereto at App. B, *infra*.

[5]Apparently the amount of marijuana involved, i.e., 197 pounds, overwhelmed the Court.

> *the motorist, and further investigation is but a reasonable exercise of state power to prevent the use of fraudulent license plates.*"[6] (Emphasis supplied)

In *Keziah* v. *Bostic*, 452 F. Supp. 912 (W.D.N.C. 1978), the defendant was driving on a public highway and was observed by an officer as the defendant came out of a private driveway onto the highway, drive about one hundred and fifty feet, and then turn into another private drive. The officer turned his vehicle around and also pulled into the drive and both drivers got out of their vehicles, approaching each other. The defendant told the officer it was his private drive and upon refusing to show his driver's license or give his name, defendant was arrested and a fracas ensued.[7] As here, the officer admitted he had no reason to believe that the defendant had broken or was about to break any law, but the officer had some vague suspicions about an individual who lived in the area.

The court first concluded that there was no doubt that the officer's stop and demand was a "seizure" within the meaning of the Fourth Amendment and that the fact that the defendant had gotten out of his car to approach the officer did not make the confrontation voluntary because the defendant could only assume that when he was followed into the driveway the officer intended to accost him for some purpose.

The court then noted that under North Carolina law patrolmen were authorized to stop any vehicle for license and registration checks and that the North Carolina

[6]The Court also ostensibly relied upon certain provisions of West Virginia motor vehicle statutes, which are appended hereto at app. B, pp. B-..... to B-....., *infra*.

[7]The defendant was convicted of assaulting a highway patrolman and on habeas corpus alleged that the fracas arose out of an illegal arrest.

Supreme Court had upheld the constitutionality of the law, seeing no constitutional problems in vesting complete discretion in the individual officer to decide which cars to stop and which to let pass. Citing *U.S.* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), and *U.S.* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the court pointed out that this Court had been more cautious. Further, the court noted that it was undisputed that the officer's "stop" could be justified only as an inspection and license check and that there was no basis for a stop under the "articulable suspicion" rationale of *Terry* v. *Ohio*, *supra*, because:

> ". . . At the time of the incident the officer was not engaged in any patrol of the highway for purposes of observing traffic or making random license checks. The mere fact that his decision to stop petitioner was spontaneous does not make his stop part of any program of random checks . . . *The overwhelming inference is that the purpose of the stop was not to conduct a routine license check but to follow up on some unarticulated hunch.*"
>
> "The stop was no less intrusive because in fact all the officer did was demand to see petitioner's license. The degree of intrusiveness depends not only on objective factors but also on the subjective reaction the stop is likely to produce . . ."[8]
>
> * * *
>
> *"The patrolman's actions illustrate the danger inherent in blanket approval of all vehicle stops where the nominal purpose is to check registration or licenses. To permit stops in the unrestrained discretion of police officers is to allow such stops to be used as pretexts for investigations and to*

[8]The court observed that because petitioner was followed into his drive at 3:00 a.m. by a police cruiser which just moments before had met him going in the opposite direction, it was perfectly natural for petitioner to assume that he was about to be subjected to a search or inquiry for some purpose other than a routine license check; that the incident was plainly a situation "fraught with anxiety."

sanction stops which could not have been justified under the standards set out in Terry. A limitation is not enough; the very stop itself may constitute an unreasonable intrusion. For this reason the decision in *State* v. *Allen*[9] is not sufficiently sensitive to the need to accomodate the state's interest in enforcing its vehicle laws to the individual's right to be free from unreasonable interference with his travel on the highways."

* * *

"It is not material that petitioner's refusal to display his license constituted an independent violation of N.C.G.S. sec. 20-29. *Since the initial stop and demand themselves were illegal, the officer could not invoke sec. 20-29 to bootstrap himself into a legal arrest.*"[10] (452 F. Supp. at 915) (Emphasis supplied).

The illegality of such "pretext" stops have been long recognized and applied in the federal courts and perhaps the majority of state courts.[11] For example in *U.S.* v. *Olivares*, 496 F.2d 657 (5th Cir. 1974), the court held that officers were not entitled to stop a car merely because they suspected that it might be transporting illegal aliens where the suspicions were based on out-of-state license plates, that it was early in the morning and in an area of high frequency alien smuggling. Similarly, *U.S.* v. *Cupps*, 503 F.2d 277 (6th Cir. 1974), held that the police may not use their powers of inspection as a pretext for the investigation of unfounded suspicions where no violations were observed. The court utilized the rationale of *Terry* to disqualify the evidence and noted that the "plain view" doctrine of *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), was not sufficient to justify a warrantless seizure of evidence when the officer's presence in the area was improper.[12] See also, *U.S.* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975); *U.S.* v. *Carriger*, 541 F.2d 545 (6th Cir. 1976); *U.S.* v. *Mallides*, 473 F.2d 859 (9th Cir. 1973); *U.S.* v. *Nicholas*, 448 F.2d 622 (8th Cir. 1971); *U.S.* v. *Carter*, 369 F.Supp. 26 (E.D. Mo. 1974).

An apparent majority of state courts have followed the federal rule, an example of which is *People* v. *Bennett*, 47 A.D.2d 322, 366 N.Y. S.2d 639 (1975), where the "stop" was ostensibly predicated on the out-of-state license plates.[13] *Kinard* v. *State*, ____Ala. ____, 335 So.2d 924 (1976), found no justification for the "stop" as did the court in *State* v. *Johnson*, 26 Ore. App. 509, 554 P.2d 194 (1976). In *State* v. *Hocker*, 113 Ariz. 450, 556 P.2d 784 (1976), the court held that an illegal "stop" would not suffice to supply the officer with probable cause. Cf. *Commonwealth* v. *Boyer*, 235 Pa. Super. 738, 345 A.2d 187 (1975); *Commonwealth* v. *Swanger*, 453 Pa. 107, 307 A.2d 875 (1973). In *State* v. *Hoven*, ____Minn. ____, decided July 21, 1978, and as yet unreported, a digest of which is found in 23 Cr. L. 2465, the police officers used fatally defective traffic warrants as a pretext to

[9] *State* v. *Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973), upheld the constitutionality of the North Carolina statute permitting officers to stop any motor vehicle to determine whether it is being operated in violation of any of the provisions of the motor vehicles law.

[10] It is apparent that the West Virginia Supreme Court indulged itself with this same "bootstrap" argument and ignored the proposition that an illegal arrest cannot be justified on the basis of a subsequent illegal search and seizure. Cf. *Wong Sun* v. *U.S.*, 371 U.S. 471 (1963).

[11] See 60 Va. L. Rev. 666, *Automobile License Checks and the Fourth Amendment* (1974), and 6 Rutgers-Camden L. Rev. 85, *Automobile Spot Checks and the Fourth Amendment* (1974).

[12] It is to be noted that in the instant case there was nothing in "plain view" since petitioner had gotten out of the van after the illegal "stop" and it was only after officer Kondik shined his flashlight through the rear window that the rifle was observed, (R. 97). This was the basis for officer Gordon entering the van and detecting an odor of what he ". . . suspected to be marijuana (R. 99). The court, in *Canal Zone* v. *Bender*, 573 F.2d 1329 (5th Cir. 1978), stated that *Terry* was ". . . not engraved on every policeman's badge . . ." and that the officer there was not justified in "poking" his head into the car.

[13] Cf. *State* v. *Ingle*, 36 N.Y. 2d 413, 330 N.E.2d 39 (1975), where the court, in citing *Brinegar* v. *U.S.*, stated that a ". . . citizen who has given no good cause for believing he is engaged in criminal activity is entitled to proceed on his way without interference. . ."

arrest a drug suspect and impound his pick-up truck. A majority of the Minnesota Supreme Court held the pretextual arrest illegal *per se* and its fruits inadmissible. The court, in so doing, held that:

> "The Supreme Court has held that to be reasonable a search must either be conducted pursuant to a valid search warrant or fit into one of the exceptions to the warrant requirement that it has defined. *** A pretext arrést to permit an otherwise unauthorized search is not one of these exceptions.
>
> Since a pretext arrest is *per se* illegal, *evidence obtained as a result of that arrest is inadmissible.* Therefore, the open paper bag containing marijuana discovered by the officers in defendant's truck should have been suppressed as the product of an illegal arrest.
>
> The state attempts to avoid this conclusion by invoking the "plain-view" doctrine under which incriminating evidence may be seized without a search warrant if discovered in plain sight by a police officer. ***
>
> *The admissibility of evidence seized in plain view, however, rests on the validity of the initial search.*
>
> ***
>
> *Since defendant's arrest in this case was illegal, the arresting officer had no right to be in a position to view the contents of his truck.* *** Likewise, because of the illegality of the subsequent custody of both defendant and the truck, the police officers at the impoundment lot had no greater constitutional right to view the vehicle than did the officer at the scene of the arrest. *The look of "prior justification" for the officers' entry into the truck makes the seizure of the brown bag unreasonable and therefore illegal under the Fourth Amendment.*" (Emphasis supplied).

It is apparent that the West Virginia Supreme Court stretched *Terry* beyond the breaking point[14] and the decision, if left standing, would permit law enforcement officers to use unfettered discretion in making "stops" contrary to all of the foregoing authorities.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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[14] "The Court stated that the letters BLMO stood for "beyond the limits of Missouri" apparently indicating a special category of vehicle registration to be used elsewhere than Missouri. The Court could only "question" whether a resident of this State could legally use a vehicle titled in his name and registered in Missouri under Code, 17A-3-2, but ostensibly used it as a basis to justify the "stop." (245 S.E.2d at 626).

APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA

v.

DALLAS KENT FRISBY

No. 13833

Supreme Court of Appeals of West Virginia
June 27, 1978

Defendant was convicted in Circuit Court, Hancock County, James G. McClure, J., of possession of marijuana with intent to deliver, and he appealed on writ of error and supersedeas. The Supreme Court of Appeals, Neely, J., held that: (1) statute which makes it a felony to "manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance" is not unconstitutional because it fails to provide standards by which jury is to determine whether defendant had the intent to manufacture or deliver; (2) statute which requires misdemeanor treatment for the first offenders guilty of possessing less than 15 grams of marijuana does not discriminate invidiously against second offenders or possessors of greater amounts, and (3) detention of vehicle without probable cause to believe that registration is irregular and without random, nondiscriminatory, preconceived plan for checking registration is contrary to the Fourth Amendment and the State Constitution, but (4) where officers saw license plate which appeared to have no state designation on it and did not appear to be regularly issued plate from any state of the union, they had reasonable grounds to believe that further investigation was warranted, and evidence of other crmes discovered pursuant to registration check of vehicle was

admissible into evidence against the occupants of the vehicle.

Affirmed.

Syllabus by the Court

1. *W. Va. Code,* 60A—4—401(a) [1971], which makes it a felony to "manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance" is not unconstitutional because it fails to provide standards by which the jury is to determine whether the defendant had the intent to manufacture or deliver.

2. *W. Va. Code,* 60A—4—401(c) [1971], which requires misdemeanor treatment for first offenders guilty of possessing less than 15 grams of marijuana, does not discriminate invidiously against second offenders or possessors of greater amounts; it merely establishes what amounts to a presumption of law that first offense possession of less than 15 grams is *not* with intent to deliver, and with regard to indictments for possession of more than 15 grams with intent to deliver, or for second offense possession with intent to deliver, the State must still, in each and every case, prove such intent beyond a reasonable doubt.

3. The question of whether a person possesses a controlled substance with intent to manufacture or deliver is a jury question to be determined like other questions of intent from all the surrounding facts and circumstances, and as such intent is a basic element of the offense, it must be proven beyond a reasonable doubt.

4. Objections during a criminal trial may be waived where (1) the trial judge requests reasons for the objections at the time they are raised; (2) reasons are then

assigned which would not cause the objection to be sustained at that time; and, (3) later after the trial has proceeded to the point where the error cannot be corrected, reasons are assigned which would have been sufficient to sustain the objection. Under these circumstances a particularly strong case for the application of "waiver" arises when it appears that failure to sustain the objection was only harmless error.

5. While police officers may enforce the licensing and registration laws for drivers and motor vehicles respectively by routine checks of licenses and registrations, such checks must be done according to some non-discriminatory, random, pre-conceived plan such as established check points or examination of vehicles with particular number or letter configurations on a given day; accordingly, detention of vehicles without probable cause to believe that a registration is irregular absent a random, non-discriminatory, preconceived plan is contrary to the Fourth Amendment to the *Constitution of the United States* and *W. Va. Constitution,* art. 3, § 6.

6. Where the police see a license plate which appears to have no state identification and which does not appear to be a regularly issued license plate from any state of the Union, they have reasonable grounds to believe that further investigation is warranted, and evidence of other crimes discovered pursuant to a registration check of such vehicle is admissible into evidence against the occupants of the vehicle without violating the Fourth Amendment to the *Constitution of the United States* or *W. Va. Constitution,* art. 3, § 6.

Leonard Z. Alpert, Weirton, for appellant.

Edward W. Gardner, Asst. Atty. Gen., Chauncey H. Browning, Jr., Atty. Gen., Charleston, for the State.

NEELY, Justice:

This appeal arises from the conviction of the appellant, Dallas Kent Frisby, for possession of a controlled substance, namely marijuana, with intent to deliver. The appellant assigns three errors: (1) the statute under which the conviction was obtained, *W. Va. Code*, 60A—4—401(a) [1971] is unconstitutional because it does not set forth definite standards for proving "intent to deliver;" (2) exhibits were introduced which tended to prove another, unrelated crime and such exhibits were not on the State's bill of particulars; and (3) the initial detention of the appellant in a motor vehicle was illegal and, therefore, all evidence found as a result of such detention was tainted. We find no merit to the appellant's arguments and affirm the judgment of conviction entered by the Circuit Court of Hancock County upon the jury verdict.

The appellant and a male companion were driving a van on the public streets of Weirton at about 2:30 a.m. on September 7, 1975. A city police officer observed a license plate on the van which had a number, over which appeared the letters BLMO. The officer testified that he had never seen a similar plate, and that the plate appeared to have no state identification. The officer stopped the van and during the course of the stop the officer's companion, a reserve policeman, noticed a rifle in plain view inside the vehicle and smelled the odor of marijuana. The appellant was taken into custody, a warrant was obtained to search the van, and the police

discovered about 175 pounds of marijuana, two weapons, a set of scales suitable for weighing marijuana, and various sizes of bags.

I

At trial all of this evidence was introduced and a jury convicted the appellant of possession of a controlled substance with intent to deliver. The provision of the law making such possession a crime, *W. Va. Code*, 60A—4—401(a) [1971] says:

> Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

We find no constitutional infirmity in this section as it establishes a jury question on the element of intent. All common law crimes require a *mens rea*, and what a person intended is always a question for jury determination under all the facts and circumstances. There is no reason to treat a statutory crime any differently. In this case the appellant had far more marijuana than an average person can consume in the course of several years, and had a scale and bags which the jury could infer were for the purpose of distributing the drug. Obviously quantity, standing alone, is evidence of intent to deliver.

W. Va. Code, 60A-4-401(c) [1971], which requires misdemeanor treatment for first offenders guilty of possessing less than 15 grams of marijuana, does not discriminate invidiously against second offenders or possessors of greater amounts; it merely establishes what amounts to a presumption of law that first offense possession of less than 15 grams is *not* with intent to deliver. That statute does not create a presumption that possession of *more*

than 15 *is* with intent to deliver; the State must still, in each and every case, prove such intent beyond a reasonable doubt. Thus there is no violation of *State v. Pendry*, W. Va., 227 S.E.2d 210 (1976) with regard to presumptions, as the 15 grams presumption is *in favor* of a defendant. Furthermore the 15 gram exception does not discriminate *invidiously*, as it affects the legitimate public policy of avoiding possible felony treatment for what is obviously a victimless crime, namely a lapse of good sense in the casual use of a dangerous drug.

II

The weapons found in the van were introduced into evidence at trial over the appellant's objection that the evidence was "irrelevant." Ten pages later in the transcript the appellant's counsel moved for a mistrial on the grounds that the evidence was not listed in the State's bill of particulars, and upon the further ground that the weapons were evidence of the commission of an unrelated crime, namely a firearms violation. We find that any error concerning evidence of another crime was, under *State v. Thomas*, W. Va., 203 S.E.2d 445 (1974), harmless beyond a reasonable doubt in light of the overwhelming weight of the other evidence, and that the objection was waived by counsel's failure to make a timely assignment of reasons when specifically asked by the trial judge. Similarly, the objection that the weapons were not listed in the bill of particulars was both harmless and waived.

III

Finally we come to the most troublesome of the appellant's assignments, namely the tenuous legality of the police's initial detention of the appellant. We recognize

that all states have motor vehicle laws requiring the licensing of drivers and the registration of motor vehicles, examples of which in West Virginia are *W. Va. Code*, 17A-3-13 [1951], 17A-9-2 [1974], 17B-2-9 [1951], and 17B-2-1 [1972]; nonetheless, enforcement of these simple regulatory laws cannot be used as an excuse to harass citizens when there is no probable cause to suspect a violation.

The weight of authority is that without the Fourth Amendment to the *Constitution of the United States* or *W. Va. Constitution*, art. 3, § 6, motorists may be stopped for no other reason than examination of licenses and registrations when such examinations are done on a random basis pursuant to a preconceived plan, such as the stopping of every car at a check point, the examination of every car on a given day with a particular letter or number group in the license, or any other nondiscriminatory procedure. *Commonwealth v. Mitchell*, 355 S.W.2d 686 (Ky.Ct.APP. 1962). However, the "routine" check cannot be used to make legitimate otherwise unwarranted police intrusion. *State v. Johnson*, 26 Or.App. 599, 554 P.2d 194 (1976). The essence of civil liberties is protection from power arbitrarily exercised by duly constituted authority. Thus regardless of length of hair, color of skin, political convictions, eccentricity of life-style, or any of the other standard grounds which inspire people to make the lives of others miserable, a person in West Virginia is free to go about his business at all hours of the day and night unencumbered by the need to relate his life's story to every passing, under-employed agent of the State.

Nonetheless, in the case before us we find that the police had reasonable grounds to believe that further investigation was warranted. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). They observed a

license plate which appeared to have no state designation on it. In fact, it later appeared before trial that the letters BLMO stood for "beyond the limits of Missouri," apparently indicating a special category of vehicle registration for persons who register their vehicles in Missouri but use them elsewhere. Among other things, we question whether a West Virginia resident would be entitled to use a vehicle titled in his name and so registered in Missouri, under *W. Va. Code*, 17A-3-2 [1967].

While a police officer's casual observation of an out-of-state license plate would not by itself warrant further investigation, the observation of a plate which does not appear to have come from any other state does. Under these circumstances further investigation is not an onerous burden on the motorist, and further investigation is but a reasonable exercise of state power to prevent the use of fraudulent license plates.

A police officer might be charged with knowledge of all standard license plates issued by the fifty states, but he is not charged with knowledge of "limited edition" plates such as the one in this case. While BLMO is a perfectly understandable abbreviation to someone conversant with the somewhat eccentric Missouri registration procedures, it is not even arguably a common license plate designation and it completely obscures the state of origin by the inclusion of two extraneous prefix letters. Accordingly, we find that the detention of the appellant for the purpose of investigating his registration and license was reasonable and that the evidence seized as a direct result of such investigation was not tainted. *See State v. Smith*, W. Va., 212 S.E.2d 759 (1975). Therefore, for the reasons set forth above, the judgment of the Circuit Court of Hancock County is affirmed.

Affirmed.

APPENDIX B

CONSTITUTIONAL PROVISIONS:

1. *Fourth Amendment to the Constitution of the United States*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. *Constitution of West Virginia* Article 3, Section 6

"The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation. particularly describing the place to be searched, or the person or thing to be seized."

STATUTORY PROVISIONS:

West Virginia Code, Ch. 17A, Article 3, section 13.

"Every owner upon receipt of a registration card shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers or shall be carried by the person driving or in control of such vehicle who shall display the same upon demand of a police officer or any officer or employee of the department. (1951, c. 129.)"

West Virginia Code, Ch. 17A, Article 9, section 2.

"No person shall operate, nor shall an owner knowingly permit to be operated, upon any highway any vehicle

required to be registered hereunder unless there shall be attached thereto and displayed thereon or shall be in the possession of the operator when and as required by this chapter a valid registration card and registration plate or plates issued therefor by the department for the current registration year except as otherwise expressly permitted in this chapter. Any violation of this section is a misdemeanor.

In the event that the registration plate or plates originally issued are lost, destroyed or stolen, a temporary facsimile of the plate or plates, showing the number of the same, may be attached to the vehicle by the owner for a period of not more than fifteen days, or until a new plate or plates are issued by the department whichever is earlier: Provided, that no such facsimile shall be used and no such vehicle shall be driven upon the highways of this State, until the owner shall have notified in writing the department of public safety of the loss of such registration plate or plates. (1951, c. 129; 1974, c. 70.)"

West Virginia Code, Ch. 17B, Art. 2, sec. 1.

"No person, except those hereinafter expressly exempted, shall drive any motor vehicle upon a street or highway in this State or upon any subdivision street, as used in article twenty-four [§ 8-24-1 et seq.], chapter eight of this Code, when the use of such subdivision street is generally used by the public unless the person has a valid license as an operator or chauffeur under the provisions of this chapter.

No person shall drive a motor vehicle as a chauffeur unless he holds a valid chauffeur's license. No person shall receive a chauffeur's license unless and until he

surrenders to the department any operator's license issued to him or an affidavit that he does not possess an operator's license.

Any person holding a valid chauffeur's license hereunder need not procure an operator's license.

Any person licensed as an operator or chauffeur as provided in this chapter may exercise the privilege thereby granted as provided in this chapter and, except as otherwise provided by law, shall not be required to obtain any other license to exercise such privilege by any county, municipality or local board, or body having authority to adopt local police regulations. (1951, c. 129; 1972, c. 71.)"

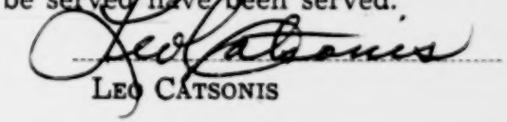
West Virginia Code, Ch. 17B, Art. 2, section 9.

"Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a justice of the peace, a peace officer, or a field deputy or inspector of the department. However, no person charged with violating this section shall be convicted if he produces in court or the office of the arresting officer an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest. (1951, c. 129.)"

CERTIFICATE OF SERVICE

I, Leo Catsonis, one of counsel for the petitioner and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 23d day of September, 1978, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the respondent by depositing same in a United States mailbox, with postage prepaid,

addressed to counsel of record for the respondents, Edward W. Gardner, Assistant Attorney General for the State of West Virginia, State Capitol Building, Charleston, West Virginia 25305. I further certify that all parties required to be served have been served.



LEO CATSONIS